

30. Although the Commission concluded that the transaction would increase the incentive and ability of Comcast to discriminate against unaffiliated programming of all types, the Commission determined that the incentive and ability to discriminate against unaffiliated RSNs was so significant as to warrant “additional measures . . . to mitigate the potential harms deriving from the increased vertical integration and increased regional concentration produced by the transactions.” *Id.* ¶ 181.

31. The Commission found that “the programming provided by RSNs” such as MASN “is unique because it is particularly desirable and cannot be duplicated.” *Id.* ¶ 189; *see also id.* ¶ 124 (RSNs provide “must-have” programming). The Commission concluded that, in light of the value of RSNs’ programming, Comcast has an “incentive to deny carriage to rival unaffiliated RSNs with the intent of forcing the RSNs out of business or discouraging potential rivals from entering the market, thereby allowing Comcast . . . to obtain the valuable programming for its affiliated RSNs.” *Id.* ¶ 189. The Commission noted that Comcast could also gain a competitive advantage over competing cable and satellite providers by obtaining valuable regional sports programming for its affiliated RSNs. *See id.*

32. To remedy these serious competitive concerns, the Commission adopted a condition “allowing unaffiliated RSNs” – such as MASN – “to use commercial arbitration to resolve disputes regarding carriage on . . . [Comcast’s] cable systems.” *Id.* ¶¶ 181, 190. The Commission emphasized that the purpose of the expedited arbitration remedy was to “alleviate the potential harms to viewers who are denied access to valuable RSN programming during protracted carriage disputes.” *Id.* ¶ 191. “The timely resolution of carriage disputes,” the Commission explained, “is particularly important given the seasonal nature of RSN programming.” *Id.* Under the *Adelphia Order*, RSNs such as MASN had 30 days from the

denial of carriage or “ten business days after release of [t]he Order” to file for arbitration. *Id.*

¶ 190. The ten-day time frame was applicable to MASN and added to the urgency of obtaining carriage through consensual dealings – instead of the litigation path the parties had been on – in the wake of the release of the order.<sup>19</sup>

33. An additional facet of the *Adelphia Order* that is crucial to understanding Comcast’s conduct is that the Commission was statutorily charged in that proceeding with making a determination whether the transaction was in the “public interest.” *Id.* ¶ 4. To that end, Comcast made a commitment to the Commission that the effect of the transaction would be to upgrade Adelphia’s antiquated systems with new technologies. As the Commission noted, both TWC and Comcast stated that the transaction would lead to the rapid upgrades and to the “accelerated deployment of advanced services.” *Id.* ¶ 3. Those representations were crucial to this Commission’s approval of the transaction, as they provided a benefit to offset the substantial anticompetitive concerns raised by the Commission’s approval of the transaction. The evidence is clear that this Commission relied on those representations: as Chairman Martin explained, Comcast “committed to make long-needed upgrades to the [former Adelphia] systems to enable the rapid and widespread deployment of advanced services to Adelphia subscribers.” *Id.*, Statement of Chairman Martin; *see also id.*, Dissenting Statement of Commissioner Copps (“Let me state upfront that the Applicants come to us with what I believe is a commitment to update and upgrade the failing Adelphia cable systems. I commend their intention to modernize these

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<sup>19</sup> The Commission subsequently suspended the *Adelphia Order*’s arbitration remedy. *See Order, Comcast Corp. Petition for Declaratory Ruling that The America Channel Is Not a Regional Sports Network*, 22 FCC Rcd 17938, ¶ 24 (2007). In suspending the remedy, however, the Commission reaffirmed its commitment to “providing an expedited and predictable program carriage complaint process at the Commission.” *Id.* ¶ 25. Although the Commission has yet to issue new, expedited rules, the Commission should nonetheless move to resolve expeditiously MASN’s complaint.

networks.”); *id.*, Statement of Commissioner Adelstein (noting that “Comcast and TWC have pledged to invest over \$1.6 billion to upgrade Adelphia’s network”). Comcast’s pledges to the Commission in connection with the Adelphia transaction were well-known throughout the cable television industry, including to MASN.

34. On the heels of the *Adelphia Order*, and more than a year after MASN had filed its program carriage complaint,<sup>20</sup> the Commission issued a landmark order finding, for the first time, that an unaffiliated RSN had made out a *prima facie* case of discrimination in the program carriage context. The Commission concluded that MASN’s carriage complaint, alleging that Comcast was refusing to carry MASN across MASN’s Territory in order to favor unlawfully the economic interests of its affiliated RSN, stated a *prima facie* case under the Cable Act’s and the Commission’s non-discrimination rules. *See MASN Order* ¶¶ 11-12.

35. In that order, the Commission explained that, in a program carriage complaint, “the burden of proof is on the programming vendor to establish a *prima facie* case that the defendant MVPD has engaged in behavior that is prohibited” by the Cable Act. *Id.* ¶ 8. On that score, the Commission held that MASN had stated a *prima facie* case that: (1) Comcast had refused to carry MASN in MASN’s Territory; (2) the refusal was discrimination based on MASN’s lack of affiliation with Comcast; and (3) Comcast had unlawfully demanded an equity interest in MASN as a condition of carriage. *See id.* ¶¶ 9-12. The Commission found, “[a]fter reviewing the pleadings and supporting documentation filed by the parties, . . . that [MASN] has established a *prima facie* showing of discrimination.” *Id.* ¶ 11. In order to address other factual issues, including those relating to remedy, the Commission referred the matter to an ALJ. The

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<sup>20</sup> *See Adelphia Order*, Statement of Commissioner McDowell (decrying the delay with which the Commission resolved the program carriage dispute, noting that “the MASN complaint has been left to rot in some lost crypt inside this building”).

Commission stayed the order, however, to give MASN an opportunity to decide whether to proceed with the complaint proceeding or with the expedited arbitration procedure as provided for by the *Adelphia Order*. The Commission gave MASN “10 days” from release of the order to decide whether to pursue arbitration under the *Adelphia Order* or referral to an ALJ. *Id.* ¶ 13.

**Post-FCC Order Discussions To Carry MASN on “All Comcast Systems” in August 2006**

36. In the wake of the Commission’s decisions in the *Adelphia Order* and the *MASN Order*, MASN sought once again to obtain a carriage agreement with Comcast “on *all* Comcast systems” as provided in MASN’s carriage term sheet. Due to the Commission’s strict ten-day time limit, however, MASN had only until August 4, 2006 to decide whether to file an arbitration demand or to proceed with the carriage complaint before an ALJ.

37. On July 25, 2006, MASN sent Comcast the latest version of the draft Term Sheet containing the same terms and conditions on which other MVPDs had agreed to carry MASN during the pendency of MASN’s carriage complaint, and which is the identical Term Sheet that MASN had sent to Comcast on prior occasions. As MASN had done with other MVPDs, the Term Sheet included a geographic map of MASN’s Territory within which Comcast was to launch “all Comcast systems” and it also contained a blank “List of Systems” entry that was to be filled in by Comcast. *See* Gluck Decl. ¶ 9. Because MVPDs have superior and often the only knowledge of the names, locations, and numbers of subscribers served by their individual cable systems, it is industry practice to leave such lists blank so that the MVPD can fill in the attachment with the cable systems corresponding to the geographic reach desired (to be determined by the MVPD based upon the territory map provided by MASN). *See id.* ¶ 8. It is also an industry norm that, unless otherwise specifically agreed to or noted, a list of systems would include *all* cable systems within the territory owned or operated by the MVPD. *See id.*

Given that MASN had consistently made clear, in the Term Sheet and in its request for relief in its program carriage complaint, that it sought carriage on all of Comcast's systems, MASN's understanding was that Comcast would include on the List of Systems all Comcast systems within MASN's Territory. *See* Wyche Decl. ¶¶ 12-16, 24-25; Gluck Decl. ¶¶ 8-11, 23.

38. Faced with adverse decisions from this Commission and the threat of arbitration under the *Adelphia Order* or litigation before an ALJ, Comcast decided finally to stop its complete foreclosure of MASN by entering into a carriage contract, but it waited until the eleventh hour to agree to do so. On the evening of August 2 – only two days before MASN's ten-day window to file an arbitration demand was set to expire – Comcast signaled its intent to “get the deal done” and scheduled a call for the next day, August 3. *See* Gluck Decl. ¶ 10.

39. That same day, on August 2, MASN again sent Comcast a Term Sheet that contained a geographic map of MASN's Territory, a description that “all Comcast systems” were to be launched, and an intentionally blank List of Systems. *See id.* Once again, MASN understood that Comcast would, under well-established industry norms, fill in the List of Systems with all of Comcast's cable systems in MASN's Territory. *See id.*

40. On or about August 3, in the first meaningful discussions over the Term Sheet, Comcast expressed, for the first time, a concern that at that time it lacked the technological capacity to add MASN to its cable systems in Roanoke/Lynchburg and other Virginia areas, as those systems were former Adelphia systems – systems that Comcast had obtained authorization from this Commission to acquire following Comcast's assurances to upgrade them with state-of-the-art cable technology. *See id.* ¶ 13; Wyche Decl. ¶ 13. Comcast proposed that it launch MASN on its cable systems within MASN's Territory in multiple phases. First, Comcast would launch MASN on its cable systems serving [REDACTED] subscribers in Regions 1 and 2 and a

portion of Region 4 by September 1, 2006. Second, Comcast would launch [REDACTED] of the remaining [REDACTED] subscribers it claimed it had in Regions 4 and 5 by April 1, 2007. Comcast further represented that it could not immediately commit to launching approximately [REDACTED] subscribers in Roanoke/Lynchburg and other Virginia areas who received their cable service through former Adelphia systems that Comcast had recently acquired. Later, on August 4, Comcast proposed to launch the [REDACTED] remaining subscribers in Region 4 and 5 in two phases: [REDACTED] subscribers would launch by April 1, 2007 and [REDACTED] subscribers would launch by April 1, 2008. *See* Gluck Decl. ¶ 13.<sup>21</sup> No mention was made during the parties' discussions of any exclusions of Comcast systems within MASN's Territory. *See* Wyche Decl. ¶¶ 13-14. Indeed, Comcast's representatives never mentioned that any of their systems other than the former Adelphia systems serving approximately [REDACTED] subscribers created any launch problems, and they never mentioned any specific geographic area that posed problems for a Comcast launch other than Roanoke/Lynchburg. *See id.* ¶¶ 13-14, 25. MASN's reasonable understanding, therefore, was that all Comcast systems in MASN's Territory would be launched by dates certain except the former Adelphia systems represented by the estimated [REDACTED] subscribers in Roanoke/Lynchburg and other Virginia areas. *See* Gluck Decl. ¶¶ 13-18; Wyche Decl. ¶¶ 13, 24-26.

41. On the afternoon of August 4 – a mere three hours before the arbitration deadline of the *Adelphia Order* was set to expire – Comcast transmitted to MASN via email a revised Term Sheet using the form MASN had provided on August 2, with changes marked in redline. Exh. 3, at 30-34. In that redlined Term Sheet, Comcast for the first time provided a List of Systems for the previously blank appendix on which it would carry MASN. *Id.* at 41-42

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<sup>21</sup> Those [REDACTED] subscribers in the Roanoke DMA were understood by both parties to be different from the [REDACTED] subscribers whose launch might be delayed until April 2008.

("Schedule A – List of Systems"). As the parties had discussed the day before, that list did not specify former Adelphia systems in Roanoke/Lynchburg and other Virginia areas serving approximately [REDACTED] subscribers. The list consisted of two full pages naming systems in all five geographic regions within MASN's Territory in which Comcast represented that it had systems. *Id.* The list also provided the number of estimated subscribers for each system and was divided into two parts, including those systems that would launch on September 1, 2006, and those that would launch by April 1, 2007, or April 1, 2008. In providing its List of Systems for the first time, Comcast gave no indication that the list excluded any of its systems within MASN's Territory except for the former Adelphia systems in Roanoke/Lynchburg and other Virginia areas and their roughly [REDACTED] subscribers. *See* Gluck Decl. ¶¶ 15-17.

42. Confirming MASN's understanding that the List of Systems was meant to memorialize rather than to alter the discussions, Comcast's email accompanying the redlined Term Sheet stated that the redlined version "reflects the deal we've been discussing over the past two days as well as some other clean-up changes." Exh. 3, at 30; *see* Gluck Decl. ¶ 17. That representation is clear that the Term Sheet would reflect the parties' discussions, which concerned *all* Comcast subscribers with the sole exception of the estimated [REDACTED] former Adelphia system subscribers. That is precisely how MASN's representatives understood the email representation. *See* Gluck Decl. ¶ 17; Wyche Decl. ¶ 18.

43. Although carriage on the former Adelphia systems was important to MASN for a variety of reasons, MASN agreed to Comcast's proposal not to include the former Adelphia systems in Roanoke/Lynchburg and other small Virginia communities from the List of Systems based on Comcast's representation that it was technologically impossible for Comcast to carry MASN on its newly acquired former Adelphia systems at that time. *See* Gluck Decl. ¶ 18.

Comcast at no point stated that it would never launch those systems when they were upgraded. *See id.* Indeed, given assurances that Comcast made to this Commission that it would soon upgrade former Adelphia systems, thereby providing the capacity sufficient to carry MASN, MASN's representatives viewed Comcast's representations to this Commission as sufficient protection that those systems would eventually be launched. *See Wyche Decl.* ¶ 13; *Gluck Decl.* ¶¶ 18, 21. MASN has since learned that former Adelphia systems consisting of nearly [REDACTED] subscribers have a 750 mhz capacity – more than ample to carry MASN. *See Wyche Decl., Exh. A.* MASN does not know when those systems achieved that capacity – whether pre-Adelphia acquisition or afterward. Comcast has refused MASN's request to launch those systems, however, even though they indisputably have the capacity to carry MASN and they carry Comcast's affiliated RSN, CSN-MA.

44. Comcast gave no written or verbal indication to MASN during the crucial August 2006 discussions of a need to exclude systems in the Harrisburg DMA, or on any non-Adelphia systems. Indeed, the subject of Harrisburg was never raised by Comcast (or by MASN, which expected that those systems would be encompassed within "all Comcast systems" to be launched). If Comcast would have made such a request to exclude Harrisburg, it would have been surpassing strange given that most of the cable systems in the Harrisburg DMA are not former Adelphia systems and the only reason that Comcast gave for needing any exclusions at all was to allow time to upgrade the antiquated systems it had acquired in the *Adelphia* transaction. In light of the importance of the Harrisburg DMA to MASN's presence in Pennsylvania and its ability to compete effectively as an RSN, MASN would have objected strenuously to any permanent exclusion and might well have elected to pursue its arbitration remedy under the *Adelphia Order*. *See Cuddihy Decl.* ¶ 20; *Wyche Decl.* ¶ 27.



45. Because MASN believed based on Comcast's representations that Comcast would provide MASN to all of its subscribers within MASN's television territory with the exception (for the time being) of subscribers in Roanoke/Lynchburg and other Virginia areas, it was MASN's understanding – both during and after the discussions on August 4 – that the List of Systems that Comcast had provided in Schedule A of the Term Sheet encompassed all of Comcast's subscribers in MASN's Territory other than the former Adelphia systems specifically discussed. The provision of the Term Sheet that allowed Comcast to carry MASN on other cable systems in MASN's Territory in Comcast's "discretion" was accordingly understood by MASN to confer on Comcast flexibility for the timing of launching only the former Adelphia systems. *See* Gluck Decl. ¶ 16. MASN also understood the "discretion" language to give Comcast certain flexibility in the event it acquired systems from other cable operators within MASN's Territory. *See id.* MASN understood that, going forward, such discretion would be bounded by the Cable Act and the FCC's program carriage rules.

46. With only three hours before the expiration of the Commission's deadline on MASN to elect arbitration or ALJ litigation, MASN reviewed the List of Systems submitted by Comcast. But, unfamiliar with Comcast's protocol for naming cable systems and given that "systems" was not even a defined term in the contract, MASN necessarily took Comcast at its word that the List of Systems reflected the prior conversations and was meant to ensure that the former Adelphia systems (for the time being) would be the only group of systems omitted from the Term Sheet. *See* Gluck Decl. ¶¶ 21-23; Wyche Decl. ¶ 23.

47. With limited time, MASN worked quickly to confirm that the List of Systems included all of Comcast's cable systems within MASN's Territory. As this Commission is aware, however, that is no easy task. *See, e.g.,* Multichannel News, *Wall Street Analyst Refutes*

*FCC's Chairman's Cable Math* (Nov. 25, 2007) (noting the controversy over FCC's cable subscribership numbers, which were inaccurate "because some cable operators withheld their subscriber and homes-passed totals") (attached as Exh. 23). For example, an MVPD's locational descriptions of its cable systems – often referred to as "head-ends" – do not always perfectly map onto the Nielsen territory designations that most programmers such as MASN use when assessing the geographic reach of their programming. *See Wyche Decl.* ¶ 19. Nonetheless, MASN sought to confirm that the List of Systems reflected MASN's understanding and Comcast's representations by comparing the total number of subscribers on the Comcast-provided list to MASN's own estimates of the total number of Comcast subscribers. Comcast's List of Systems contained a total of [REDACTED] subscribers. When the estimated [REDACTED] former Adelphia systems were added to this number, the total of [REDACTED] subscribers compared favorably to MASN's internal estimates that Comcast had roughly [REDACTED] subscribers within MASN's territory. *See Wyche Decl.* ¶ 20. In addition, only an MVPD knows the actual penetration levels of its programming tiers and the number of total subscribers. Nielsen reports only basic subscriber totals and systems reports list only expanded basic subscribers. Without Comcast's disclosure of any inclusions or omissions from its List of Systems, a cross reference of its proprietary "system" names compared with Nielsen's head-end names, and actual Comcast subscriber numbers, MASN was in no position independently to assess Comcast's List of Systems. Comcast failed to disclose to MASN that the List of Systems it prepared was incomplete and no longer represented "all Comcast systems" with MASN's Territory (other than the specific former Adelphia systems that had been discussed).

48. Comcast at no time informed MASN that it had unilaterally and arbitrarily excluded systems serving some [REDACTED] additional subscribers from the List of

Systems, in such places as the Harrisburg and Tri-Cities DMAs, nor did Comcast ever raise those areas as places where it had any need or intention to exclude carriage. *See* Gluck Decl. ¶ 23.

Comcast thus omitted material information in transmitting revisions to the Term Sheet on August 4 when it stated in its cover email that the August 4 Term Sheet “reflects the deal [the parties had] been discussing” over previous days. Exh. 3, at 30. Nothing about the exclusion of Harrisburg, the Tri-Cities DMAs, or any non-former Adelphia systems “reflects the deal” that had been discussed.

49. MASN’s principal representatives, David Gluck and Mark Wyche, had substantial experience with Comcast and its principal representatives, Matt Bond and Alan Dannenbaum. Wyche and his firm, Bortz Media, have undertaken previous consulting assignments on behalf of Comcast. As such, Wyche had no reason not to trust what he understood to be Bond’s representations that the only exclusions from the Term Sheet were the former Adelphia systems serving [REDACTED] subscribers in Roanoke/Lynchburg and other Virginia areas. *See* Wyche Decl. ¶ 26. Similarly, Gluck had negotiated with Comcast on other previous occasions and had no reason to suspect that any Comcast subscribers were being excluded from the Term Sheet other than the former Adelphia systems specifically discussed by the parties’ representatives. *See* Gluck Decl. ¶¶ 17-18, 21. Both Wyche and Gluck, therefore, believed that all Comcast subscribers other than the approximately [REDACTED] subscribers of former Adelphia systems specifically mentioned by Comcast’s representatives were encompassed within the Term Sheet agreement. *See* Wyche Decl. ¶¶ 24-26; Gluck Decl. ¶ 23.

50. MASN and Comcast signed the Term Sheet on August 4, less than three hours after MASN received Comcast’s List of Systems and less than a half-hour before the deadline to file for arbitration under the *Adelphia Order*. Comcast was aware of that deadline and requested

that the parties complete the deal so that MASN would not file an arbitration demand with the AAA. In addition to setting forth terms of carriage, the Term Sheet settled and released MASN's pending program carriage complaint and Comcast's suit in state court against MASN.

**Comcast's Discriminatory Refusal to Carry MASN in Harrisburg and Other Areas**

51. Although MASN discussed and believed that it had obtained a carriage agreement with Comcast covering all of MASN's Territory except for subscribers of the former Adelphia systems in Roanoke/Lynchburg and other Virginia areas (where MASN expected that carriage would ensue in a reasonable time after Comcast upgraded those systems), Comcast has refused to carry MASN's programming in numerous other systems representing approximately [REDACTED] subscribers that are *not* former Adelphia systems in which Comcast carries an affiliated RSN. Comcast has never offered any plausible justification for those systems not to have launched as part of the original August 2006 agreement. Comcast has also made clear, in the nearly two years since it made representations to this Commission that it would upgrade the former Adelphia cable systems, that it has no intention of providing any timeline for launching MASN on any of those systems notwithstanding this Commission's approval of the *Adelphia* transaction in part on the ground that Comcast would make "must-have" programming available to the subscribers of those systems. It has taken MASN more than a year to verify the names of Comcast's systems and the number of subscribers in those systems. *See Wyche Decl.* ¶¶ 22-23.

52. In January 2007, four months after Comcast's first launch of systems, MASN first learned that Comcast did not intend to launch MASN on certain of its cable systems serving approximately [REDACTED] subscribers in and around Harrisburg, Pennsylvania. That discovery was made during the process of sending special technical equipment – IRDs – to Comcast's head-ends that would enable Comcast's systems to receive two feeds from MASN, one for

Washington Nationals games and the other for Baltimore Orioles games. Because the first launch of Comcast systems in September 2006 had not encompassed such Comcast-named Pennsylvania systems as Lancaster, Carlisle, and Chambersburg – those were scheduled to be launched on April 1, 2007 – MASN was in the process of preparing for the beginning of the 2007 season when MASN would be televising both Orioles and Nationals games. The distribution of appropriate equipment would enable subscribers to receive feeds for both teams when they played at the same time (and an “overflow” channel was necessary to televise both games). *See* Cuddihy Decl. ¶ 22.

53. After it learned that in fact not all of Comcast’s systems had launched (or were about to be launched under the Term Sheet’s April 1, 2007 secondary launch), MASN initiated an effort to document the locations where Comcast had not launched in MASN’s Territory. That effort required extensive investigation into the names and locations of Comcast’s systems and the numbers of subscribers on those systems. Comcast officials participated in those efforts, and the determination of Comcast’s systems and number of subscribers would have been impossible without that assistance. After more than a year of such efforts, MASN has determined that it has not been launched on Comcast’s cable systems encompassing approximately [REDACTED] subscribers in Harrisburg, Roanoke, and Tri-Cities DMAs, and in other smaller systems in Virginia and Pennsylvania in the Richmond-Petersburg, Charlottesville, Norfolk, Pittsburgh, and other DMAs. *See* Wyche Decl., Ex. A. All told, these systems serve approximately [REDACTED] of Comcast’s subscribers within MASN’s Territory. The time-consuming nature of MASN’s efforts to learn where it has not been launched – and the reluctance of Comcast itself to provide precise numbers and system information during that process – underscores the necessary reliance MASN placed on Comcast’s eleventh-hour List of Systems on Schedule A as encompassing all Comcast

systems other than the former Adelphia systems specifically discussed during the parties' talks in August 2006. When Comcast stated on August 4 that the Term Sheet "reflects the deal we've been discussing" (Exh. 3, at 30) and made no mention of excluding any systems in Harrisburg or any systems at all other than former Adelphia systems, MASN had no choice but to take the cable company at its word.

54. On April 23, 2007, MASN and Comcast entered into a standstill agreement in which both parties agreed to refrain from taking any legal action in any forum "during the pendency of good faith negotiations between the parties." (Attached as Exh. 24.) For a year, the parties sought various ways of obtaining carriage on the unlaunched systems, with Comcast seeking steep discounts on rates, substantially delayed launches, economic givebacks tantamount to MASN purchasing carriage, or refusing to carry MASN at all. Despite MASN's best efforts to obtain carriage and its willingness to explore a variety of means to achieve a compromise, those negotiations have not produced a carriage agreement.

55. With respect to the Harrisburg DMA, Comcast has taken the firm negotiating position, despite Comcast's history of carriage of Orioles games in the region, that MASN is not in demand in all its systems in the Harrisburg DMA, that not every system in the Harrisburg DMA is included in the List of Systems, and that Comcast is therefore under no obligation to provide carriage of MASN to Comcast's approximately [REDACTED] subscribers in and around Harrisburg, Pennsylvania. Comcast has taken this position despite the fact that it has launched certain smaller systems within the Harrisburg DMA and it carries its own affiliated RSN, CSN-Philly, in the Harrisburg DMA. Comcast's actions thus represent a failure to extend equal treatment to MASN as an unaffiliated RSN. The exclusion of Harrisburg from the Term Sheet,

moreover, is not a defense to Comcast's conduct, but, in light of Comcast's bad-faith negotiating, is in fact evidence of Comcast's continued discriminatory campaign against MASN.

56. Comcast has also refused to carry MASN in the Roanoke/Lynchburg and other Virginia systems that are former Adelphia cable systems. Since agreeing to the Term Sheet, MASN has routinely inquired of Comcast to learn when the promised upgrades of the former Adelphia systems would occur. Carriage on those systems is important to MASN given that Comcast has approximately [REDACTED] subscribers on them. *See supra* note 5. The bulk of those subscribers also reside in southwestern Virginia DMAs, which represent a key part of any effort of MASN to compete with Comcast's affiliated RSN. Comcast's refusal to carry MASN on those systems is discrimination in violation of the Cable Act and the FCC's rules.

57. Comcast's refusal to carry MASN on the unlaunched systems in Virginia and Pennsylvania is part of Comcast's continuing discrimination to favor its affiliated RSNs, which are telecast on the majority of those systems. *See generally* Declaration of Dr. Hal J. Singer ¶¶ 14-28 ("Singer Decl.") (attached as Exh. 25). Such discriminatory treatment enables Comcast to depress interest in MASN's sports programming content in those regions, which enhances the value of its advertising on its affiliated RSNs and enables them to serve as an advertising conduit to promote Comcast's vertically integrated monopoly position. Denying carriage to MASN also enhances the value of other competitive MLB offerings in those DMAs in which Comcast has a direct financial interest, such as the Extra Innings package, in which Comcast derives subscriber revenues, and the Baseball Channel, in which Comcast holds an equity ownership interest. By denying viewers the opportunity to watch MLB games of the Orioles and Nationals, Comcast is able to channel viewers in those DMAs to the out-of-market games in which it has a direct financial interest. *See Wyche Decl.* ¶¶ 31-32. Such discrimination runs afoul of the anti-

discrimination proscriptions of the Cable Act and this Commission's rules, and impedes the ability of viewers to watch "must-have" MLB programming in their teams' home television territory. *See* Singer Decl. ¶¶ 23-25.

58. Unable to reach agreement with Comcast for the remaining [REDACTED] subscribers after nearly one year's negotiating effort and given the absence of any realistic prospect of a successful negotiation, on March 7, 2008, MASN provided Comcast with written notice of its intent to file a complaint with the Commission in compliance with 47 C.F.R. § 76.1302(a) (attached as Exh. 26). Comcast responded to that notice on March 17, 2008 (attached as Exh. 27). Among other things, Comcast asserted that MASN's allegations of unlawful discrimination amount to a "willful breach" of the 2006 Term Sheet and implied that Comcast would walk away from its obligations under the agreement if MASN tried to vindicate its rights under federal law and this Commission's *Adelphia Order*. *Id.* at 2.

59. Subsequently, in April 2008, Comcast attorneys requested that MASN provide information pertaining to MASN's claim that Comcast had agreed to launch "all Comcast systems" except those former Adelphia systems in the Roanoke DMA. MASN provided copies of key provisions of the last two term sheets, showing that MASN's expectation (based on Comcast's representations) was that "all Comcast systems" would launch and that the only exclusions intended on the Comcast-created Schedule A were to reflect the "deal we've been discussing" between the parties — *i.e.*, the former Adelphia systems that Comcast represented could not be launched until upgraded. *See* Exh. 3. Notably, in numerous discussions about carriage occurring over many months during the April 2007-April 2008 time period, Comcast has not once denied that the exclusion of Harrisburg and other systems (other than former Adelphia systems) was never discussed during the August 2006 carriage talks, which focused on



when Comcast would launch MASN on various systems and not *whether* any systems were to be excluded from carriage. Indeed, on several occasions Comcast's lead negotiator Matt Bond affirmed that Harrisburg was not mentioned during those discussions. Instead of acknowledging that the omission of Harrisburg and other systems (apart from those in the Roanoke DMA) was the product of a mistake (at best), Comcast has taken the position that the omission of [REDACTED] of subscribers in critical parts of MASN's territory was somehow "intended" by the parties. Comcast offered that theory in an acerbic letter accusing MASN of making "frivolous" claims and threatening legal action against MASN, its officers, and its lawyers if it brought these concerns to the Commission's attention. See Exh. 27, at 2. That response heightens MASN's concern that Comcast willfully excluded [REDACTED] of subscribers from the Term Sheet at the eleventh hour in markets where Comcast's affiliated RSNs directly compete with MASN, and that Comcast did so using stratagems familiar to this Commission: opaque information about the true number of its actual subscribers and head-end descriptions that do not comport with publicly available descriptions that would enable a contracting party reasonably to verify Comcast's representations.

60. Comcast's refusal to carry the approximately [REDACTED] subscribers in the MASN territory has a direct competitive effect on MASN's ability to compete with CSN-MA for the rights to Washington Wizards, Washington Capitals, and (pre-season) Washington Redskins games when CSN-MA's contracts with those professional sports franchises expire. Indeed, the amount of revenue generated by those subscribers would enable MASN to compete head-to-head with CSN-MA for the telecast rights to one of those teams. Without access to those unlaunched subscribers, moreover, MASN will face an unequal playing field in competing with CSN-MA for the rights to "must-have" programming within MASN's Territory. See Cuddihy Decl. ¶ 15.

Comcast's discriminatory foreclosure strategy, therefore, represents an attempt to shield affiliated RSNs from competition for the rights to professional sports programming and for the sports-focused advertising revenues in markets where Comcast has refused to launch MASN. *See* Singer Decl. ¶¶ 26-27 (discussing harm to advertisers from Comcast's conduct).

61. In light of the consistent refusal of Comcast to negotiate a resolution of the parties' impasse and/or to adhere to its program carriage obligations under federal law, MASN was forced to come to this Commission once again to remedy Comcast's affiliation-based discrimination against MASN. This complaint seeks to end, once and for all, the discriminatory campaign that Comcast began in 2005.

#### COUNT ONE

##### **COMCAST'S REFUSAL TO CARRY MASN ON COMCAST SYSTEMS THAT WERE NEVER ADELPHIA SYSTEMS IN VIOLATION OF THE COMMUNICATIONS ACT AND COMMISSION RULES**

62. The allegations in paragraphs 1-61 above are repeated here.

63. Comcast's refusal to carry MASN in those systems that were not former Adelphia systems (such as in the Harrisburg and Tri-Cities DMAs) is discrimination against an unaffiliated video programmer in violation of the Cable Act and the Commission's implementing regulations.

64. MASN is similarly situated to CSN-Philly in the Harrisburg DMA for the purpose of the non-discrimination mandates of the Cable Act and the Commission's rules. MASN and CSN-Philly are each RSNs under federal law and each carry the games of major professional sports teams, including baseball teams, establishing that MASN and CSN-Philly are actual and potential competitors.

65. MASN is similarly situated to CSN-MA in Virginia DMAs for the purpose of the non-discrimination mandates of the Cable Act and the Commission's rules. MASN and CSN-MA are each RSNs under federal law and each carry the games of major professional sports teams, establishing that MASN and CSN-MA are actual and potential competitors.

66. Comcast is "engaged in the business of making available for purchase . . . multiple channels of video programming" and is thus an MVPD. 47 C.F.R. § 76.1300(d).

67. CSN-Philly and CSN-MA are affiliated with Comcast for the purpose of the Commission's program carriage obligations.

68. MASN is "engaged in the production, creation, or wholesale distribution of video programming for sale" and is thus a programming vendor. 47 U.S.C. § 536(b); *see also* 47 C.F.R. § 76.1300(e). CSN-Philly and CSN-MA are also video programming vendors.

69. Section 616 of the Communication Act provides in pertinent part that the Commission "shall establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors." 47 U.S.C. § 536(a). In particular, Congress directed that the regulations shall:

(3) contain provisions designed to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.

47 U.S.C. § 536(a)(3).

70. In 1993, the Commission adopted rules to implement that provision. The relevant regulation is codified at 47 C.F.R. § 76.1301(c), and states: "No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain

the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.”

71. Accordingly, 47 C.F.R. § 76.1301(c) bars Comcast from discriminating against MASN on the basis of its non-affiliation with Comcast. Comcast’s refusal to carry MASN in the unlaunched systems is discriminatory on its face: Comcast is denying to an unaffiliated RSN the same carriage terms and conditions that it provides to its affiliated RSNs. There can be no doubt that if Comcast’s affiliated RSNs carried Orioles and Nationals games, those games would be shown throughout the teams’ seven-state television territory (corresponding to MASN’s Territory). Indeed, Comcast went to court in an attempt to preserve its ability to telecast Orioles games on its affiliated network, and bid for the rights of Nationals games as well. Comcast’s conduct with respect to the discussions resulting in the Term Sheet is independently unlawful, as it represents bad-faith discriminatory treatment of an unaffiliated RSN.

72. The purpose and effect of Comcast’s discrimination is to protect Comcast’s affiliated RSNs from competition from MASN, since Comcast owns and operates affiliated RSNs being carried on those Comcast systems. The ultimate effect of Comcast’s discrimination is anticompetitive harm to consumers. *See* Singer Decl. ¶¶ 22-25.

73. CSN-Philly, for example, has the rights to televise the Philadelphia Phillies, a competing MLB franchise to the Orioles and Nationals. Refusing to carry MASN protects the advertising and other revenue that Comcast derives from its RSN. *See* Cuddihy Decl. ¶¶ 15-16; Wyche Decl. ¶ 30. Denying MASN carriage also increases the size of the television audience for CSN-Philly’s programming, which includes the Phillies, thereby increasing the value of the

Phillies' television rights and thus the advertising rates that CSN-Philly can charge during Phillies games. *See* Cuddihy Decl. ¶¶ 15-16; *see also* Singer Decl. ¶¶ 26-27.

74. Beyond that, CSN-Philly carries the games of the Philadelphia Flyers (NHL) and the Philadelphia 76ers (NBA). Comcast holds an ownership interest in both of those teams. *See* Comcast Corp., Form 10-K at 1 (SEC filed Feb. 20, 2008) (attached as Exh. 28). Comcast thus has an incentive to limit MASN's reach in Pennsylvania to ensure that MASN's current and future programming of the Orioles and Nationals (and any other professional sports programming that MASN may acquire in the future) does not compete for the loyalties of and advertising dollars directed at Pennsylvania sports fans. *See* Cuddihy Decl. ¶¶ 15-17.

75. In addition, by denying MASN carriage in the Harrisburg DMA, Comcast impedes the ability of the Orioles and Nationals to develop and grow their fan base in southern Pennsylvania. If MASN fails to establish a foothold in southern Pennsylvania, MASN's only option for presenting Orioles and Nationals games in that market would be to enter into a sub-licensing arrangement with Comcast on one of its affiliated networks. *See* Cuddihy Decl. ¶ 17. In that way, Comcast is pursuing a strategy of squeezing an independent, rival RSN into selling valuable sports programming at below-market rates, something that it has previously demonstrated a willingness and ability to do.

76. Comcast's denial of carriage in the Harrisburg DMA also prevents MASN from becoming a full competitor for broadcasting other sports programming in southern Pennsylvania. Should Comcast be permitted to deny MASN carriage in the Harrisburg DMA and thus to keep MASN from being a credible competitor for access to sports programming in the area (indeed, MASN already holds the rights to Ravens pre-season programming and Harrisburg is within the

television territory of the Ravens), Comcast's monopsony power will enable it to depress the price for television rights to sports programming.

77. Shutting MASN out of the Harrisburg DMA also benefits a planned baseball channel in which Comcast maintains an equity interest. The cable television group iN DEMAND – composed of industry giants Comcast, TWC and Cox Communications – struck a deal to carry MLB's Extra Innings, a premium sports package that allows a subscriber to view a wide range of out-of-market MLB games throughout the season.<sup>22</sup> In return, the iN DEMAND trio, including Comcast, agreed to carry the MLB Channel on its basic programming tiers upon the channel's projected launch in 2009.<sup>23</sup> The iN DEMAND group reportedly obtained a [REDACTED] equity interest in MLB's planned network. The deal thus provides substantial incentives for Comcast to limit MASN's reach in Pennsylvania, including the Harrisburg DMA. Comcast subscribers will be less likely to watch the MLB Channel and less willing to pay for Extra Innings if they already have access to games played by the home team Orioles or Nationals. In addition, the Orioles and Nationals play, and MASN broadcasts, dozens of games against popular out-of-market teams like the Boston Red Sox, New York Yankees, New York Mets, and Chicago Cubs. Such broadcasts further erode the value of the MLB Channel and the Extra Innings package for Comcast's subscribers. See Wyche Decl. ¶¶ 31-32.

78. Comcast's proffered business reasons for refusing to carry MASN cannot carry its burden of justifying its disparate treatment of MASN and CSN-Philly. Comcast's assertion that

<sup>22</sup> See CBS News, *MLB to Keep "Extra Innings" on Cable* (Apr. 4, 2007), [http://www.cbsnews.com/stories/2007/04/04/business/main2649774.shtml?source=RSS&tr=Entertainment\\_2649774](http://www.cbsnews.com/stories/2007/04/04/business/main2649774.shtml?source=RSS&tr=Entertainment_2649774) (attached as Exh. 29).

<sup>23</sup> See Barry N. Bloom, MLB.com, *MLB Reaches iN DEMAND Deal* (Apr. 4, 2007), [http://mlb.mlb.com/content/primer\\_friendly/mlb/y2007/m04/d04/c1880145.jsp](http://mlb.mlb.com/content/primer_friendly/mlb/y2007/m04/d04/c1880145.jsp) ("Those cable operators that agree to carry the product would also be required to offer the new MLB Channel on its basic tier when it is launched in 2009.") (attached as Exh. 30).

there is a lack of demand for MASN in Harrisburg is unsupported and is objectively without merit. For years before the launch of MASN, CSN-MA, Comcast's own affiliated RSN, carried Orioles games in Harrisburg. Given that Comcast itself carried Orioles games on a basic programming tier, Comcast's claims that fan interest is now inadequate to support continued distribution of Orioles games is implausible on its face. That is especially so in light of the addition of Nationals games and other MASN sports programming of great interest to Harrisburg viewers (which far exceeds the live professional sports programming provided by CSN).

79. The value of (and demand for) MASN's programming is further demonstrated by the fact that every other major MVPD in MASN's Pennsylvania territory *other than Comcast* has agreed to carry MASN. *See Cuddihy Decl.* ¶ 9.

80. Comcast lacks a legitimate business reason for its differential treatment MASN and its affiliated RSNs on the Virginia cable systems.

81. Comcast's refusal to carry MASN in the Tri-Cities DMA and on the Virginia cable systems undermines MASN's ability to compete fairly in those areas for, among other things, advertising dollars, fan loyalties, subscribers, and sports programming rights. *See id.* ¶ 18; *see also Singer Decl.* ¶¶ 22-27.

82. Shutting MASN out of systems in Virginia DMAs also benefits Comcast through its carriage of MLB's Extra Innings and the Baseball Channel, as set forth above.

83. The Term Sheet provides no legal defense to Comcast's discriminatory refusal to extend same carriage treatment to MASN as it does to its affiliated RSNs. On its face, the Term Sheet provides no indication that MASN forfeited its rights to insist that Comcast abide by its program carriage obligations with respect to any Comcast system within MASN's Territory. Furthermore, the negotiating history of the Term Sheet makes clear that Comcast misled (or was

reckless in leading) MASN to believe that all Comcast systems would be included on the List of Systems in the Term Sheet except for those former Adelphia systems in Roanoke/Lynchburg and other Virginia areas specifically discussed. *See supra* ¶¶ 36-50. The effect of Comcast's negotiating conduct, moreover, is to insulate CSN-Philly from competition in the Harrisburg DMA and CSN-MA from competition in the Virginia DMAs. Accordingly, the exclusion of those Comcast systems from the Term Sheet is, in fact, proof of Comcast's discriminatory treatment of MASN; such conduct provides no basis for relieving Comcast of its program carriage obligations in the Harrisburg or Tri-Cities DMAs or with respect to any other cable system. This Commission has an obligation to ensure that dominant MVPDs negotiating with unaffiliated RSNs in negotiations effectively compelled by this Commission's orders engage in good-faith negotiating practices. Comcast's failure to do so here is part and parcel of discrimination under applicable law. *See Singer Decl.* ¶ 28.

84. Nor do the release clauses of the Term Sheet provide a safe harbor for Comcast's discriminatory conduct. The release clauses apply by their terms to Comcast's conduct prior to the date of the Term Sheet. The core of this complaint seeks to hold Comcast liable for its conduct and its program carriage violations *since* the Term Sheet – namely, Comcast's unreasonable and discriminatory refusal to carry MASN on the unlaunched systems.

85. Furthermore, if the release clauses could be read to encompass Comcast's future conduct and thereby to immunize it for all times from program carriage obligations, this Commission should refuse to enforce those clauses as a matter of federal regulatory policy. *Accord* Report and Order and Further Notice of Proposed Rulemaking, *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 21828, ¶ 55 (2007) ("law affords [the Commission] wide authority



to prohibit the enforcement of [contractual] clauses where . . . the public interest so requires”); Singer Decl. ¶ 28.

86. In addition, to the extent that the release clauses can be read to immunize Comcast from its intentional or reckless misrepresentations about the scope of the Term Sheet, the release clauses should be void as against federal public policy. This Commission has a duty to ensure that negotiations between MVPDs and unaffiliated RSNs are conducted in good faith; allowing MVPDs to engage in bad-faith negotiations and then to shield themselves from liability through such release clauses would be contrary to policies embodied in the Cable Act and this Commission’s program carriage rules. *See* Singer Decl. ¶ 28.

87. Finally, the carriage rates proposed by MASN are fair and reasonable in light of the popularity and value of live, must-have sports programming that MASN offers and will offer in the future. *See* Wyche Decl. ¶¶ 33-36. The value of MASN’s programming is evidenced by the fact that, prior to the launch of MASN, CSN-MA carried Orioles games in the Harrisburg DMA and throughout the Virginia systems that Comcast now refuses to launch. The value of MASN’s programming is confirmed by the fact that every other major MVPD in the relevant parts of MASN’s Territory other than Comcast has agreed to carry MASN at the rates MASN has proposed for Comcast.

88. Comcast’s post-Term Sheet discriminatory conduct is evidenced by other actions. Alone among the other 20 MVPDs to carry MASN, Comcast immediately raised its rates to its subscribers and then publicly blamed MASN for that price increase in a direct mail campaign to every one of its subscribers. *See* Cuddihy Decl. ¶ 23. To further punish MVPDs that had contracted with MASN, Comcast then *raised* its rate for CSN-MA to an amount far greater than that charged by MASN, even though CSN-MA no longer has any professional baseball